

THE FLAGS WRANGLE

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Paper

Imagine: the indeterminate British minority in the Republic chooses to fly the union flag; it then demands – because of imperatives of identity – that its flag fly on government buildings along side the Irish tricolour, contrary to the constitution. That's analogous to the provocative – and possibly illegal – stand taken by the two Sinn Féin (but not SDLP) ministers in Northern Ireland.

In United Kingdom law, the union flag symbolizes the state. It is part of what lawyers call the royal prerogative. The act of union of 1800 linked the sovereign's responsibility for 'royal stile and titles' with 'the ensigns armorial, flags and banners thereof'. And a royal proclamation of 1 January 1801 specified that the combined crosses of Saints Andrew, Patrick and George should signify the new united kingdom.

Official flag days – there are 20 in 2000 – are determined by the sovereign (not necessarily all on the advice of ministers): a royal command is sent to the department of culture, media and sports, which notifies other departments including the Northern Ireland Office ('NIO').

The Northern Ireland Act ('NIA') 1998, which deals with excepted matters under devolution, lists first 'The Crown, including the succession to the Crown...'. This remains the responsibility of London. It then goes on – the parliamentary draftsman copying 1973 (but not 1920) legislation – to exempt 'functions [as regards the crown] in relation to Northern Ireland of any Minister of the Crown'.

It is unclear whether parliament intended to deprive the secretary of state of any responsibility for flying the national flag on government buildings in Northern

Ireland. Nothing was said by ministers in 1998 (when it was known Sinn Féin would be in the executive). And the *Notes on Clauses* prepared for MPs and peers includes as excepted matters: 'Royal Styles and titles in the UK; the Royal Arms and royal standards'.

The Scotland Act 1998, in contrast, makes clear that ministers in Edinburgh have some responsibility for the union flag.

The NIA 1998 states, as respects transferred matters, that the royal prerogative shall be exercisable by Northern Ireland ministers or departments. Bairbre de Brún and Martin McGuinness, in refusing to fly the union flag, purport to exercise the royal prerogative 'on Her Majesty's behalf' (and seek to fly the Irish tricolour)!

This view – that the union flag is a transferred matter – is, I submit, wrong. It was taken seemingly by the two ministers' civil service advisers last December. But why did the Northern Ireland Civil Service not argue it was a matter for the Northern Ireland departments? The view also appears to have been accepted by the NIO (seemingly on the basis of past administrative practice by previous Stormont governments).

The only legal resolution of this devolution issue, under the NIA 1998, is proceedings instituted by the attorney general, Lord Williams of Mostyn, before ideally the judicial committee of the house of lords. Their lordships would be asked to decide: what responsibility did the secretary of state have?; is this transferred under the NIA 1998?; and do Northern Ireland ministers have the power not to fly the union flag?

The first minister and deputy first minister acting jointly could also do this. The Sinn Féin ministers would be prohibited – with suitable sanctions – from exercising the function in the manner proposed (i.e. no union flag) while the issue was being decided legally.

While David Trimble was fighting to restore the executive, the secretary of state put the Flags (Northern Ireland) Order 2000 through parliament on 16 May 2000. This empowers Peter Mandelson to 'make regulations regulating the flying of flags at government buildings'.

A number of points escaped comment:

- one, the secretary of state has not made the order that the Order shall come into operation;
- two, he has to refer any draft regulations to the assembly;
- three, the regulations have to be approved by each house of parliament;
- four, Lord Falconer of Thoroton (in a newsworthy comment) put a different connotation on the regulations in the house of lords: 'Is it necessarily helpful to require the flag to fly from every government building...?';

- five, there is an argument that the Order – not primary legislation - is ultra vires the NIA 1998, based on the inability of the assembly to transfer a devolved power other than with cross-community support (this is another possible devolution issue for the house of lords).

When it comes to the law on flags, it is important to distinguish people and state. In the United Kingdom, the national flag may be flown on land (not sea) by British citizens. The Flags and Emblems (Display) Act (Northern Ireland) 1954 prohibited the flying of any emblem (mainly the Irish tricolour) that might occasion a breach of the peace.

This was repealed in 1987 by Westminster, as a result of Irish pressure through the intergovernmental conference. From that point, the tricolour joined the union flag as legal rival sectarian symbols – a popular marking of communal segregation, along with wall murals and painted kerbstones. The union flag and tricolour are also party flags.

It is the logic of the streets that Sinn Féin has now imported into public office (its attempt to replace United Kingdom sovereignty with a united Ireland being reflected - somewhat inconsistently - in invocations of the principles of neutralism [no flags] and parity of esteem [if the union flag, then the tricolour also]. What about the tricolour on its own?).

The Belfast Agreement – to which Sinn Féin did not sign up – is cited invariably in justification. This treaty, which binds the United Kingdom and Irish states in international law, says nothing of the sort about the national flag of the state.

The British-Irish Agreement indicates Northern Ireland as being under one sovereignty. And the Strand Three sub-section dealing with the British-Irish intergovernmental conference states 'There will be no derogation from the sovereignty of either Government (sic).'

The only possible relevant provision is – the inconclusive - Economic, Social and Cultural Issues subsection. This does not bite legally on either state, 'participants' referring only to the Northern Ireland political parties. It is about the assembly, where there has been 'sensitivity' in the use of, for example, the blue linen plant motif. It is also about politics. There is an argument that the phrase 'symbols and emblems' (used twice) does not even include the national flag: between 1954 and 1987, in Northern Ireland law, an emblem was described as including 'a flag of any kind other than the Union flag'.

The origin of Sinn Féin's opportunism lies in the report of the independent commission on policing of 9 September 1999. There, Chris Patten, having declined to disband the RUC, engaged in compensating symbolic liquidationism: the abolition of the name; replacement of the force's badge and symbols; the end of the flying of the union flag from police buildings – 'free from association with the British or Irish states'.

The Patten report is not part of the Belfast Agreement, and the independent commission had no (or bad) legal constitutional advice, but it explains why Sinn Féin, back in office with inspection replacing decommissioning, is gunning for the union flag and (with nationalists) is trying to uphold Patten against the secretary of state's plan announced to parliament on 19 January 2000.

Sinn Féin returned to office on Tuesday, 30 May 2000. Two days later, David Trimble talked about the DUP's post-Waterfront opportunism as having legal and political ramifications. The following day, the Sinn Féin ministers refused to fly the union flag. There were no immediate legal ramifications, either from the first minister and deputy first minister, or the secretary of state.

There is one more flag day in June – 17 (this Saturday). There follow three in August, and four in November. The expectation must be – in the absence of the first minister and deputy first minister acting jointly (and the political parties agreeing to leave national flags alone) - that republicanism's cultural war will continue.